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No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM 1994

CITY OF HAYWARD, CALIFORNIA,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 814 of the Fair Housing Act, codified as 42 U.S.C. § 3614 (d)(1)(B) requires a municipality to pay compensatory damages due to an erroneous decision by a city retained independent arbitrator which is found to have the effect of violating the Fair Housing Act where the record shows that the arbitration decision was not based on discriminatory intent, was not administratively reviewed, reviewable or ratified by the city's legislative body, and liability for damages is based solely on the municipality's adoption of a facially neutral ordinance requiring participation in an arbitration proceeding and the hiring of the arbitrator.

2. Whether the standards used for assessing municipal entity liability for compensatory damages in cases filed pursuant to 42 U.S.C. § 1983 and § 1981 should be applied to Fair Housing Act cases.

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## PETITION FOR CERTIORARI

## OPINIONS BELOW IN THIS CASE

*U.S. v. City of Hayward, Cal.*, 805 F.Supp. 510 (N.D. Cal. 1992) and *U.S. v. City of Hayward*, 36 F.3d 832 (9th Cir. 1994).

## JURISDICTIONAL STATEMENT

This petition for certiorari, filed pursuant to 28 U.S.C. § 1254, seeks review of the Ninth Circuit Court of Appeal's Opinion in this case, filed on September 19, 1994 and reported at *U.S. v. City of Hayward*, 36 F.3d 832 (9th Cir. 1994). (See attached Appendix at pp. 3a et seq.) The petition for rehearing submitted by petitioner-defendant City of Hayward (City) was denied on January 24, 1995. (Appendix pp. 1a-2a.) The court of appeal had jurisdiction over cross appeals filed by the City and respondent United States based on 28 U.S.C. § 1291. These appeals were taken from the district court's final judgment entered pursuant to an order granting summary judgment and injunctive relief in favor of the United States and denying summary judgment for the City, filed on November 2, 1992. The district court's decision is reported at *U.S v. City of Hayward*, 805 F.Supp. 810 (N.D. Ca. 1992) and is based on the jurisdiction conferred by 28 U.S.C. § 1345 and 42 U.S.C. § 3614.

## STATUTORY PROVISIONS

This case pertains to certain provisions of the Fair Housing Act (42 U.S.C. § 3601 et seq.), which describe the discretion available as to the remedies in a pattern or practice action filed by the Department of Justice pursuant to Section 814 of the Fair Housing Act. This provision is

codified as 42 U.S.C. § 3614, which provides in pertinent part as follows:

> Section 3614. Enforcement by the Attorney General.
>
> (a) Pattern or practice cases
>
> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.
>
> . . .
>
> (d) Relief which may be granted in civil actions under subsections (a) and (b)
>
> (1) In a civil action under subsection (a) or (b) of this section, the court —
>
> (A) may award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this subchapter as is necessary to assure the full enjoyment of the rights granted by this subchapter;
>
> (B) may award such other relief as the court deems appropriate, including monetary damages to persons aggrieved; and
>
> (C) may, to vindicate the public interest, assess a civil penalty against the respondent —
>
> (i) in an amount not exceeding $50,000, for a first violation; and

(ii) in an amount not exceeding $100,000, for any subsequent violation.

Other pertinent Fair Housing Act provisions are 42 U.S.C. § 3615 and § 3617. 42 U.S.C. § 3615 provides as follows:

Section 3615. Effect on State Laws.

Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.

42 U.S.C. § 3617 provides in part as follows:

Section 3617. Interference, Coercion, or Intimidation; Enforcement by Civil Action.

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by Section 3603, 3604, 3605, or 3606 of this title.

## STATEMENT OF THE CASE

This case presents first impression issues of great concern to petitioner City of Hayward (City) and other similarly situated local governments (municipalities). First, did Congress intend 42 U.S.C. § 3614, subdivision (d)(1)(B), to require a municipality named as a defendant in a Fair

Housing Act case to pay compensatory damages in all cases if an aggrieved person can show that an arbitrator retained by a municipality violated the Fair Housing Act? The City will show that the plain language of 42 U.S.C. § 3614 vests the court with discretion to require a municipal entity defendant to pay compensatory damages in appropriate instances. Second, should the standards developed in 42 U.S.C. § 1983 and § 1981 cases for evaluating claims of municipal entity liability for compensatory damages be applied to Fair Housing Act cases? The City believes that these standards should be applied to Fair Housing Act cases because the legislative history of the Fair Housing Act is silent as to this issue. In addition, the Fair Housing Act is based on policies similar to § 1983 and § 1981. Further, the application of § 1983 standards will further the statutory purposes of the Fair Housing Act.

**A. Statement of Facts.**

This case arises from the decision of an independent arbitrator retained by petitioner City. The arbitrator found after five days of hearings that mobile home park owner S.G. Borello and Sons' admission of families with children to the Eden Roc Mobile Home Park reduced amenities previously enjoyed by the park's tenants, consequently entitling the tenants to a modest reduction in rent. Before the arbitration hearing began, the mobile home park owner filed a request for a temporary restraining order (TRO). After the Alameda County Superior Court refused to issue a TRO preventing the arbitration from going forward, the park owner filed an administrative complaint with the United States Department of Housing and Urban Development (HUD). This first of three complaints eventually filed with HUD alleged that the park owner's tenants had used the City's rent control ordinance to interfere with the owner's Fair Housing Act rights. HUD determined there was no merit to the owner's initial complaint, stating that HUD

regarded the tenants' action "to petition a governmental body as a fundamental right, which no provision of the federal Fair Housing Act is intended to deny or interfere with." HUD further advised that while the owner's stated interest in renting to families was commendable, the seniors might "rightfully perceive that they are being denied certain rights and/or privileges which they formerly enjoyed in that community as consideration for the rent which they paid and that those changes, if substantiated, constitute some diminution in value. HUD further concluded that such a complaint was "not properly a matter of discrimination within the jurisdiction of the Fair Housing Act."

The arbitration hearing thereafter took place over a period of five days. Both the park owner and the tenants were represented by counsel. Each side presented evidence and argument to the arbitrator. Inter alia, the tenants testified at the arbitration that they considered the park to be a senior citizen community and that the park owner had reneged on a promise to maintain the park as a senior citizen oriented community.

After the close of the hearing, the arbitrator issued a 21-page decision and order setting forth findings of fact and conclusions of law. The arbitrator found that prospective tenants were told by the owner or his agents that the park was a seniors' community were asked to verify that they were 55 or older, and that seniors chose to move into the park because it was operated as and held out to be a seniors' community. The arbitrator also found that over 80 percent of the tenants at the subject mobile home park were over 55 years of age when the 1988 amendments to the Fair Housing Act took effect. Inter alia, these amendments added families with children as a protected classification, however, certain qualifying senior citizen housing could exclude families with children. The arbitrator agreed that she had no jurisdiction to determine whether the mobile

home park had qualified or would qualify under any of the senior housing exceptions to the Fair Housing Act. The arbitrator found that the senior character of the park had a real and tangible value to the senior tenants, which had been reduced by the mobile home park owner's actions. Based on the evidence presented, the arbitrator found the tenants entitled to a modest rent reduction, averaging approximately $6.60 per month.

The park owner then filed a second and third Fair Housing Act administrative complaint with HUD. HUD rejected the second complaint which alleged disparate treatment pursuant to the City's mobile home ordinance. The owner later filed a third complaint with HUD which HUD referred to the United States; this administrative complaint alleged that the park owner's senior citizen tenants had "coerced, intimidated, threatened and interfered" with the park owner's ability to rent to families in violation of the anti-coercion provisions of the Fair Housing Act [42 U.S.C. § 3617].

**B. Procedural Background.**

On November 26, 1991, the United States (sometimes Department of Justice) filed this action against the City in the federal district court for the Northern District of California. The City was the only defendant named in the complaint. The complaint alleged that the arbitration decision in favor of the tenants violated 42 U.S.C. § 3615, which states that any local law that "purports to require or permit any action that would be a discriminatory housing practice" is invalid. It further alleged that such arbitration decision also violated the anti-coercion provisions of 42 U.S.C. § 3617, which provides that "[i]t shall be unlawful to coerce, intimidate, threaten, or interfere with any person . . . on account of his having aided or encouraged any person in the exercise or enjoyment of, any right granted or protected"

under the Act. The complaint prayed for injunctive and declaratory relief on the grounds that the City's mobile home ordinance, "is invalid to the extent that as applied, it purports to permit discriminatory housing practices." The complaint also prayed for damages and attorney's fees on behalf of the park owner. The City filed an answer on December 31, 1991, denying the Department's charging allegations.

The City and the United States subsequently filed cross-motions for summary judgment. The United States argued that the rent reduction granted to the seniors by the arbitration decision was unlawful and the City was therefore guilty of coercion and interfering with the owner's efforts to rent to families with children. The City argued that its only participation in the arbitration was the hiring of the arbitrator, therefore no City conduct was at issue. The City also argued that the arbitrator's careful examination of the issues and modest reduction of the seniors' rent did not constitute coercion, intimidation or interference under the Act. The City also alternatively argued that there were triable issues of fact as to whether any coercion or interference had occurred. The evidence submitted to the court indicated that the mobile home park owner admitted the arbitration decision had no impact on his decision and ability to rent to non-senior citizens, nor did the park owner dispute the reasonableness of the rent as reduced by the arbitration decision. The undisputed evidence submitted by the City also indicated that its mobile home rent ordinance did not allow the arbitration decision to be reviewed by the City Council, or any other City official before it became final and subject to judicial challenge.

The district court thereafter granted summary judgment in favor of the Department. (App. 21a) The court ruled that the arbitrator could not lawfully find that any senior housing had any extrinsic value. The court also ruled the arbitrator

did not have the ability to order a rent reduction pursuant to the City's rent control ordinance where senior housing was no longer provided. *U.S. v. City of Hayward, Cal.*, 805 F. Supp. 810, 814 (N.D. Ca. 1992) The court permanently enjoined the City "from interpreting its ordinance in this manner" and ordered the City to rescind the rent reductions authorized by the arbitration decision. Id. 805 F. Supp. at 816. The district court also found, based on the record, that the City's:

> ". . . actions were neither frivolous, malicious nor oppressive. Hayward was attempting to facilitate a dispute between a landlord and tenants, and its ordinance is not discriminatory on its face. While Hayward ran afoul of the FHA, there is no evidence of improper motive; therefore, the Court declines to award compensatory or punitive damages." *Ibid.*

Judgment was entered on November 3, 1992. (App. 21a)

The City appealed from summary judgment decision finding the City in violation of the Fair Housing Act. The United States filed a cross appeal from the denial of a compensatory damage award. On September 19, 1994, the court of appeal issued a decision sustaining the grant of summary judgment for the United States. (App. 3-20a) The court held that the City was liable for the payment of compensatory damages due to the arbitration decision because the aggrieved mobile home park owner "did not voluntarily submit to the arbitrator, but was compelled by the City to do so." The court also held that the "reasoning in *Curtis v. Loether,* 415 U.S. 189 (1974) and the legislative history of the 1988 [Fair Housing Act] Amendments indicate that if a party proves actual damages, a district court's award of compensatory damages is mandatory, not discretionary." (App. 18a) The case was remanded the case to the district court to enable the United States to prove that Borello, the subject mobile home park owner, had suffered

actual damages. The court's decision also stated that "[i]f the United States proves actual damages, the district court shall award compensatory damages." (App. 20a)

**C. Argument.**

**1. 42 U.S.C. § 3614(d) Expressly Provides that an Award of Compensatory Damages in a Department of Justice Pattern or Practice Case is Discretionary, Not Mandatory.**

The central issue presented by this Petition is whether the court of appeal's decision is consistent with the language of 42 U.S.C. § 3614, subdivision (d)(1), which provides that a court may award injunctive relief, compensatory damages and civil penalties in a pattern or practice case filed by the Department of Justice. The City does not dispute the court's determination that the arbitration decision at issue in this case had the unintended effect of violating the Fair Housing Act because the arbitrator purported to require a mobile park owner to reduce his tenants' rents due to a change of the park from "adults only" status to a family park environment.

The plain language of 42 U.S.C. § 3614, subdivision (d)(1) states that compensatory damages "may" be awarded.[1] The court of appeal nevertheless held that compensatory damages *must* be awarded against the City even

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[1] 42 U.S.C. § 3614 (d)(1) provides in pertinent part as follows:

(d) Relief which may be granted in civil actions under subsections (a) and (b)

(1) In a civil action under subsection (a) or (b) of this section, the court —

(A) may award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this subchapter as is necessary to assure the full enjoyment of the rights granted by this subchapter;

though the arbitrator is entitled to arbitral immunity, based on *Curtis v. Loether,* 415 U.S. 189 (1974) and the legislative history of the 1988 amendments to the Fair Housing Act. As next discussed, the legislative history and the *Curtis* case do not support this interpretation.

**2. The Legislative History of the 1988 Amendments to the Fair Housing Act Indicates That an Award of Compensatory Damages Is Discretionary in a Pattern or Practice Case.**

Although damages have been available in Fair Housing Act private party actions since its adoption in 1968,[2] injunctive relief was the sole remedy available in a Fair Housing Act pattern or practice case filed by the Department of

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(B) may award such other relief as the court deems appropriate, including monetary damages to persons aggrieved; and

(C) may, to vindicate the public interest, assess a civil penalty against the respondent —

(i) in an amount not exceeding $50,000, for a first violation; and

(ii) in an amount not exceeding $100,000, for any subsequent violation.

[2]See former 42 U.S.C. § 3612 which provided in pertinent part as follows:

(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

Pub.L. 90-284, Title VIII, § 812, Apr. 11, 1968, 82 Stat.88.

Justice until 1988.[3] In 1988, the Fair Housing Act provision pertaining to such Department of Justice cases was amended to authorize, in appropriate cases, an award of compensatory damages to the aggrieved person and civil penalties as 42 U.S.C. § 3614. Pub.L. 90-284, Title VIII, § 814, as amended by Pub.L. 100-430, § 8(2), Sept. 13, 1988, 1988, 102 Stat. 1634. The legislative history of this change to the statute governing pattern and practice cases is scanty and is set forth in the House Report as follows:

> Section [3614(d)] provides the types of relief a court may award in a civil action under this Section. Existing preventive relief continues, as well as other appropriate relief including monetary damages for the persons aggrieved. The Committee intends that relief may be awarded to all persons affected by the discriminatory housing practice. Allowing the court to award monetary relief to persons aggrieved avoids later duplicative litigation as such persons bring actions to vindicate their rights. H.R. Rep. No. 711, 100th Cong., 2d Sess. 40,

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[3]Former 42 U.S.C. § 3613 which was adopted in 1968, provided as follows:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

In 1988, the Fair Housing Act was amended. The provisions governing pattern or practice cases are now found in 42 U.S.C. § 3614.

reprinted in 1988 U.S. Code and Congressional News. at p. 2201.

Since the legislative history is silent as to the standard to be applied in determining when an award of compensatory damages is required as to a governmental entity defendant, it seems reasonable to presume that Congress intended to allow the courts discretion to develop standards to determine when an award of compensatory damages is appropriate as long as the result reached in an individual pattern or practice case does not promote duplicative litigation.

Thus, the City submits that the statute itself and its legislative history clearly indicate that an award of compensatory damages is discretionary rather than mandatory. Moreover, as next discussed, the City believes that a statutory interpretation mandating a governmental entity to pay compensatory damages flowing from any act of its employees or officials is inconsistent with the policies established by this court as to related civil rights statutes.

### 3. The Standards Set Forth In 42 U.S.C. § 1983 Cases For Liability of a Municipality Should Be Applied to Fair Housing Act Cases.

The *Curtis* case is not controlling because it was brought pursuant to the pre-1988 provisions of the Fair Housing Act. The language in *Curtis* which seems to require a mandatory award of damages in a private enforcement case is therefore dictum. The central issue in *Curtis* was whether a party could demand a jury trial in a civil action pursuant to former 42 U.S.C. § 3612, the Fair Housing Act provision then governing private actions. In its decision on the jury trial issue, the court parenthetically stated that "if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount." (*Id.* at 197.)

This dictum is also not controlling because at the time *Curtis* was decided, damages were not available in a pattern

or practice case filed by the Department of Justice. In 1988, the Fair Housing Act was amended to authorize compensatory damages in such cases, if the court deemed such an award appropriate. 42 U.S.C. § 3614.

More significantly, the extension of the *Curtis* holding to governmental entity defendants is also inconsistent with this court's subsequent cases construing claims of governmental liability for compensatory damages in civil rights actions filed pursuant to 42 U.S.C. § 1983 (§ 1983). Notably, in 1974, the year that *Curtis* was decided, governmental entities were immune from § 1983 damages pursuant to *Monroe v. Pape,* 365 U.S. 167 (1961).

In 1978, the court issued its landmark decision in *Monell v. Dept. of Soc. Serv. of City of N.Y.,* 436 U.S.658 (1978), which overruled the *Monroe* case and held that municipalities are "persons" for the purposes of 42 U.S.C. 1983. In *Monell*, the policy under scrutiny was a city rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary. The court held that a municipality could not be held generally liable under a theory of respondeat superior. Rather, governmental liability for § 1983 damages arises only when the deprivation of rights arises from an act which has been officially sanctioned or ordered by the entity.[4]

In a subsequent trilogy of cases, the court has further defined the applicable standards where a claim for compen-

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[4]For instance, in *Owen* v. *City of Independence*, 445 U.S. 622 (1980), the court held that a municipality's legislative body could be held liable for § 1983 damages for a single decision in certain instances if the legislative body's acts directly deprive a person of civil rights. The issue in that case was the City Council's adoption of a resolution firing plaintiff Owen without a pre-termination hearing in violation of the Due Process clause. Thus, the action challenged in that case was one taken directly by the municipality's highest policy making body, its City Council.

satory damages is pursued against a governmental entity based on an singular act committed by a municipal employee. In *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), a physician appealed the dismissal of his civil rights action against county and city officials due to deputy sheriffs' attempts to serve capiases on third parties in the physician's offices. A capias is a writ which commands a county official to bring before the court a subpoenaed witness who has failed to appear in order to answer for civil contempt. When the physician denied entry, the deputy sheriffs chopped through the door and carried out a forced entry into plaintiff's medical office to search for several witnesses. The court of appeal affirmed the dismissal of the plaintiff doctor's case. A plurality of this court reversed the dismissal and remanded the case for further proceedings. *Pembaur* provides that "[m]unicipal liability attaches only where the decision-maker possesses final authority to establish municipal policy with respect to the act ordered." *Id.* 475 U.S. at 481. The plurality opinion also states that the mere fact that a particular official has discretion to exercise municipal functions does not, "without more give rise to municipal liability based on an exercise of that discretion." *Ibid.* Moreover, as decided by the *Monell* case, municipal entity liability cannot be based solely on respondeat superior. Rather, municipal entity liability under § 1983 attaches only where a governmental official has the final delegated authority to make binding policy on behalf of a governmental entity and then proceeds to make a deliberate choice to follow a course of action which deprives a person of civil rights from among several alternatives available to the official. The court also cautioned that a deliberate or mistaken act taken by a public official which is contrary to local law, cannot expose the governmental entity to liability. *Id.* 475 U.S. at 486. The court then reversed the dismissal and remanded the case for further proceedings.

In *City of St. Louis v. Prapotnik*, 485 U.S. 112 (1988), the question was when an official's actions can be said to represent a decision of the municipality itself and therefore create inferred municipal entity liability. The plaintiff in that case was a City of St. Louis employee who contended that his layoff and transfer was a penalty for exercise of his First Amendment rights. On appeal, the court held that the plaintiff failed to establish the existence of an unconstitutional municipal policy. Further, the fact that the decisions of the plaintiff's supervisor were not individually reviewed by higher officials and the tendency of the civil service commission with appellate jurisdiction to defer to supervisors' decisions were not sufficient to support a conclusion that the supervisor had the authority to establish an employment policy for the City of St. Louis regarding transfers and layoffs.

The plurality opinion in the *Prapotnik* case also set forth two policy considerations which are to be used to determine whether a lower official's actions may be deemed to be actions of the entity. First, if an unconstitutional practice is widespread enough, it may constitute a custom or usage with the force of law even though it may not be expressly authorized as municipal policy. Second, as indicated in *Pembauer*, "the authority to make municipal policy is necessarily the authority to make *final* policy" and whether a particular official has such authority is generally a question of state law. *Id.* 485 U.S.at 123.

The plurality opinion also identifies three situations where a subordinate official's acts may be said to be those of the governmental entity. A comparison of these standards with the instant case reveals that none of these situations are present in this case. First, *Prapotnik* indicates that if an official's discretionary decisions are constrained by policies set by higher officials, such policies constitute the act of the entity. *Id.* 485 U.S. at 127. This factor is not present in the

instant case. Further, the City has an express policy prohibiting discrimination against families with children. Rather, the arbitration decision at issue herein is an interpretation of a facially neutral mobile home rent stabilization ordinance. Thus, the City had no policies whatsoever which required the arbitrator to construe its mobile home ordinance in a manner which violates the Fair Housing Act. As found by both the district court and the court of appeal, the arbitrator's decision was a singular erroneous act with the effect, but not the intent, of violating the Fair Housing Act.

Second, *Prapotnik* indicates that if a subordinate's decision is subject to review by an entity's authorized policy makers, then such policy makers have retained the authority to measure the official's conformance with the entity's policies and the entity is liable for the subordinate's actions. *Ibid.* The City's mobile home rent stabilization ordinance indicates on its face that arbitration decisions are "final and binding" when issued. Thus, the arbitration decision construed in this case was not reviewable by the City's highest policy making body or any other official.

Third, *Prapotnik* also indicates that actual ratification by the authorized policy makers of a subordinate's decision would be directly chargeable to the entity. *Id.* 485 U.S. at 127. There is no indication whatsoever in this case that the arbitration decision was ever ratified or adopted by the City Council or any other official. Nevertheless, the City was determined to be liable for compensatory damages resulting from the arbitration decision because the arbitrator was appointed pursuant to a City ordinance mandating arbitration, "the arbitrator's authority was derived solely from the City's appointment in accordance with the City's ordinance," and the arbitrator would not have had the authority to interpret the City's ordinance without such delegation. Therefore, the court of appeals indicates the City is liable for all compensatory damages resulting from the effect of

the arbitration decision solely because the City's ordinance required the parties to arbitrate rent disputes and the City hired the arbitrator. (App. 17a)

This court has also decided a third case which extends the *Pembauer* standard to cases filed pursuant to 42 U.S.C. § 1981 (§ 1981). In *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989), the plurality decision held that a municipality may not be held liable for its employees' violation of § 1981 under the doctrine of respondeat superior. Further, the jury instruction that a school district could be held liable for the actions of its board of trustees and delegated administrative officials for a wrongful personnel action was manifest error because the determination of whether the official has final policy making authority under state law is a legal question which must be resolved before submitting a case to the jury.

The standards developed in the *Pembauer* and *Prapotnik* cases should be applied to Fair Housing Act cases as guidance for a determination whether a governmental entity is liable for the acts of its employees or alleged agents. Fair Housing Act cases against governmental entities are based on policy considerations which are similar to those of § 1981 and § 1983. The application of such standards is also consistent with the only guidance articulated in the legislative history of the 1988 amendments to the Fair Housing Act, which provides that awards of compensatory damages can be appropriately awarded in order to prevent duplicative litigation.

## CONCLUSION

Neither the express terms of the Fair Housing Act, nor the legislative history of the 1988 amendments thereto enabling the award of compensatory damages in a Department of Justice pattern and practice case *require* an award of compensatory damages to be imposed on a municipal defendant. Further, the standards developed in the *Pembauer, Prapotnik* and *Jett* cases should be extended to Fair Housing Act cases where it is contended that a municipality or other governmental entity should be liable for compensatory damages due to acts taken by a subordinate municipal employee independent or official. Accordingly, the City requests the court to grant this Petition for Certiorari.

Respectfully submitted,

MICHAEL. J. O'TOOLE, *City Attorney*
PENNY NAKATSU, *Assistant City Attorney*

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PENNY NAKATSU,
*Attorney for Petitioner*
*City of Hayward, California*

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
*Plaintiff-Appellant,*
*v.*
CITY OF HAYWARD,
*Defendant-Appellee.*

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
*v.*
CITY OF HAYWARD,
*Defendant-Appellant.*

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No. 93-15190
D.C. No. CV-91-04187-FMS

**ORDER**

No. 93-15195
D.C. No. CV-91-04187-FMS

FILED
January 24, 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

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Before: FLETCHER and TROTT, Circuit Judges, and KING,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

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* The Honorable Samuel P. King, Senior District Judge for the District of Hawaii, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

**FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
*Plaintiff-Appellant,*

*v.*

CITY OF HAYWARD,
*Defendant-Appellee.*

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

*v.*

CITY OF HAYWARD,
*Defendant-Appellant.*

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No. 93-15190
D.C. No. CV-91-04187-FMS

No. 93-15195
D.C. No. CV-91-04187-FMS

**OPINION**

Appeals from the United States District Court
for the Northern District of California
Fem M. Smith, District Judge, Presiding

Argued and Submitted
April 14, 1994 — San Francisco, California

Filed September 19, 1994

Before: Betty B. Fletcher and Stephen S. Trott, Circuit Judges, and Samuel P. King,* District Judge.

Opinion by Judge Trott

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* The Honorable Samuel P. King, Senior District Judge for the District of Hawaii, sitting by designation.

## SUMMARY

Government Law/Housing/Individual Rights

The court of appeals affirmed in part a district court judgment, reversed in part, and remanded. The court held that a rent reduction pursuant to a city ordinance, as a result of a mobilehome park owner's switching from an "adults-only" policy to a "family park" policy, constituted "interference" with the park owner on account of its action in encouraging families with children to live in the park, and thus violated the Fair Housing Act ("FHA").

S. G. Borello & Sons, Inc. ("Borello") is the owner and operator of the Eden Roc Mobilehome Park in Hayward, California. The park had a written policy to rent only to tenants over 18 years of age. In 1988, Congress amended the FHA to prohibit discrimination against families with minor children. Congress, however, recognized a need for senior housing and created an exclusion for "housing for older persons."

Borello decided to end the park's adults-only policy and issued new park rules making the park a family park. Approximately 190 park tenants filed a petition with the Rent Review Office of appellee the City of Hayward. They sought a rent reduction under the City's rent control ordinance, on the ground that admitting children to the park constituted a reduction in housing services. Pursuant to the ordinance, the Office assigned the tenants' petition to an arbitrator. The arbitrator granted the tenants' petition to an arbitrator. The arbitrator granted the tenants' petition, reasoning that maintaining an adults-only environment constituted a service, and that, by removing the restriction, the owner deprived the tenants of the service. The arbitrator ordered a permanent reduction in the tenants' base rents.

Borello filed administrative complaints with the Secretary of the Department of Housing and Urban Development,

alleging the City interfered with Borello's ability to encourage families with children to live at the mobilehome park. The Attorney General of the United States filed an action in the district court against the City for violating § 3617 of the FHA, which provides that it is unlawful to "interfere" with a person on account of his having aided another in exercising rights granted under certain sections of the FHA. The district court granted summary judgment for the government, concluding that, as a matter of law, the City violated § 3617 because the arbitrator's decision "penalized" and "interfered with" Borello's decision to provide housing to families with children. The court permanently enjoined the City from interpreting its ordinance in such a manner, but denied the government's request for compensatory and punitive damages. Both parties appealed.

[1] Under § 3617, the rent reduction constituted "interference" with the mobilehome park owner on account of its action in encouraging families with children to live in the park. [2] The City's argument that the rent reduction was simply a reflection of the reduced value of housing services was rejected. Value cannot be attached to unlawful discrimination; [3] Borello's only act was to terminate the adults-only policy. [4] the only lost value was the value placed on discriminatory housing practice, which was a "value" that could not be sanctioned. [5] In response to terminating a discriminatory practice, the City penalized Borello by forcing it to forego a portion of its income with on corresponding savings in costs. This alone was sufficient as a matter of law to constitute interference.

[6] Eden Roc did not qualify for the senior housing exemption. [7] Eden Roc did not have "significant facilities and services" specifically designed to meet older persons' physical or social needs.

[8] the government argued the district court should have given it the opportunity to prove actual damages because the

FHA's compensatory damages provision is not discretionary. [9] The Supreme Court's reasoning in a 1974 case, and the legislative history of the 1988 FHA amendments indicate that if a party proves actual damages, a district court's award of compensatory damages is mandatory, not discretionary.

[10] Thus, summary judgment for the government was proper. The district court was instructed on remand to give the government the opportunity to prove Borello suffered actual damages.

## COUNSEL

Kathy M. Banke, Crosby, Heafey, Roach & May, Oakland, California, for the defendant-appellee and cross-appellant.

Lisa Stark, United States Department of Justice, Washington, D.C, for the plaintiff-appellant and cross-appellee.

## OPINION

TROTT, Circuit Judge:

In response to the 1988 Fair Housing Act ("FHA") Amendments prohibiting discrimination based on familial status, a mobilehome park owner terminated the park's adults-only status. A city-appointed arbitrator concluded that this change in policy decreased the housing services provided by the park to its tenants and accordingly required the owner to reduce the rent pursuant to a city rent control ordinance. The United States sued the City of Hayward in federal court for violating § 3617 of the FHA. The district court granted summary judgment for the United States because it concluded that, as a matter of law, the City may not penalize the mobile home park's owner for complying with federal law. The district court permanently enjoined the City from interpreting its ordinance in a manner that conflicts with the FHA and ordered the park's base rent

restored to the level it would have been absent the arbitrator's ruling, but did not award compensatory or punitive damages. The city appeals summary judgment, and the United States cross-appeals the court's refusal to award compensatory damages. We affirm summary judgment but reverse the district court's denial of compensatory damages.

## I

S.G. Borello & Sons, Inc. ("Borello") has been the owner and operator of the Eden Roc Mobilehome Park in Hayward, California since 1984. Until 1989, the park had a written policy to rent only to tenants over 18 years of age. As a result of this policy, by December 13, 1988, over 80% of Eden Roc's units were occupied by at least one person age 55 or older.

In 1988 Congress amended the FHA to prohibit discrimination against families with minor children. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601-3631 (1988)). Congress found wide-spread discrimination against families with children and enacted the 1988 Amendments to protect this social institution from discriminatory housing practices. H.R. Rep. No. 711, 100th Cong., 2d Sess., 19-21 (1988), *reprinted in,* 1988 U.S.C.C.A.N. 2173 [hereinafter House Report]. The goal of the FHA was to make more housing opportunities available to families with children. Nevertheless, Congress recognized a need for senior housing and created an exclusion for "housing for older persons." Pub. L. No. 100-430 § 6, 102 Stat. at 1622 (codified at 42 U.S.C. § 3607(b) (1988)). The 1988 Amendments became effective in March of 1989. *See id.* § 13(a), 102 Stat. at 1639.

Confronted with the 1988 Amendments, Borello initially considered making the park a senior housing facility, in accordance with the FHA's senior housing exemption. *See*

42 U.S.C. § 3607(b). But, when it concluded that Eden Roc would not qualify for the senior housing exemption, Borello decided to end the park's adults-only policy and so notified the residents. The first family with children moved into the park in the summer of 1989. On January 1, 1990, Borello issued new park rules making the park a family park, effective July 2, 1990.

On January 16, 1990, approximately 190 park tenants filed a petition with the City of Hayward's Rent Review Office. They sought a rent reduction under the City's rent control ordinance, on the ground that admitting children to the park constituted a reduction in housing services. The City's rent control ordinance provides:

> In any case where the arbitrator determines that a reduction in services has effectively resulted in an increase in rent without notice thereof, the arbitrator may either order the owner to fix, repair or otherwise cure the reduction in services, or reduce the rent owed to the owner in an amount that will compensate the tenant for such reduction in services.

City of Hayward Ord. No. 89-057 C.S. § 8(k). The City Rent Review Office assigned the tenants' petition to an arbitrator.[1] On March 13, 1990, Borello filed a complaint in state court, seeking to enjoin the petitioners' actions. Two weeks later, the state court dismissed the complaint.

On May 30, 1990, the arbitrator granted the tenants' petition. She reasoned that maintaining an adults-only environment constituted a service and that by removing the restriction, the owner deprived the tenants of this service. Consequently, the arbitrator ordered a permanent reduction

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[1] Section 5(d) of the ordinance provides: "Upon receipt of the petition, the Rent Review Officer shall, within three (3) working days, assign an arbitrator."

in the tenants' base rents by the amount of the most recent rent increase — approximately $6.60 per month per tenant.

Borello then filed a petition in state court for a writ of mandamus against the City, requesting that the arbitrator's decision be set aside. The court denied the petition. Borello also filed administrative complaints with the Secretary of the Department of Housing and Urban Development ("HUD"), alleging the City interfered with Borello's ability to encourage families with children to live at the mobilehome park. The Secretary referred the matter to the Attorney General of the United States, *see* 42 U.S.C. § 3610(g)(2)(C) (1988), who filed this action in federal court against the City of Hayward for violating § 3617 of the Fair Housing Act, *see id.* § 3614(b)(1)(A).

The district court granted summary judgment for the United States. The court concluded that, as a matter of law, the City of Hayward had violated § 3617 of the FHA because the arbitrator's decision "penalize[d] and interfere[d] with Borello's decision to provide housing to families with children." The district court permanently enjoined the City from interpreting its ordinance in such a manner but denied the United States' request for compensatory and punitive damages. Both parties appeal.

## II

"A grant of summary judgment is reviewed de novo to determine whether, viewing the evidence in a light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court applied the relevant substantive law." *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

A.

[1] We are first asked to determine whether, under § 3617 of the FHA, the rent reduction constituted "interference" with the mobilehome park owner on account of its action in encouraging families with children to live in the park. We hold that it did.

The FHA provides: "It shall be unlawful to coerce, intimidate, threaten, or interfere with any person . . . on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605 or 3606 of this title." 42 U.S.C. § 3617 (1988). "[T]he language 'interfere with' has been broadly applied 'to reach all practices which have the effect of interfering with the exercise of rights' under the federal fair housing laws." *Michigan Protection & Advocacy Serv. v. Babin,* 18 F.3d 337, 347 (6th Cir. 1994) (quoting *United States v. American Inst. of Real Estate Appraisers,* 442 F. Supp. 1072, 1079 (N.D. Ill. 1977)); *see also Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 209 (1972) ("The language of the [FHA] is broad and inclusive."). Courts have found various types of conduct to constitute "interference." "Interference" ranges from racially motivated firebombings, *see Stirgus v. Benoit,* 720 F. Supp. 119, 123 (N.D. Ill. 1989), to exclusionary zoning, *see United States v. City of Birmingham,* 727 F.2d 560, 563 (6th Cir.), *cert. denied,* 469 U.S. 821 (1984); *United States v. City of Black Jack,* 508 F.2d 1179, 1188 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975), and insurance redefining, *see Laufman v. Oakley Bldg. & Loan Co.,* 408 F. Supp. 489, 497-98 (S.D. Ohio 1976). Recently, however, the Sixth Circuit concluded that economic competition did not constitute interference. *Michigan Protection,* 18 F.3d at 347 (finding no § 3617 violation where neighbors outbid a prospective purchaser who intended to use the residence as a group home for mentally disabled students).

[2] The City argues that rent reduction did not constitute a penalty or interference, but was simply a reflection of the reduced value of housing services. We reject this argument because we cannot attach value to unlawful discrimination. The Supreme Court has suggested that the law should not sanction private biases. *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-49 (1985); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.") Therefore, if the difference in the value of housing services was solely attributable to the termination of a discriminatory practice, we cannot recognize that change in value as legitimate.

[3] The arbitrator's conclusion that changing the adults-only policy reduced housing services hinged on her determination that the tenants would no longer be "assured the stability and predictability of their environment." Her decision provided no explanation how changing the adults-only policy reduced housing services, other than to reflect the lost value of a discriminatory practice. If Borello had terminated certain services, there might have been a legitimate basis for reducing the rent, but because Borello's only act was to terminate the adults-only policy, the reduction in the value of housing services was caused solely by the change in policy.

[4] The City argues that by exempting senior housing from the familial-status provisions of the FHA, Congress recognized that senior housing as extrinsic value and that the rent reduction merely reflected the loss of this value. We agree Congress recognized that senior housing has some legitimate value, otherwise it would not have created a senior housing exemption. But the structure of the senior housing exemption suggests Congress based this value on the fact that such housing is "tailored to [seniors'] specific needs." *See* House Report, *supra*, at 21. Congress identified

those specific needs by requiring senior housing to have "significant facilities and services specifically designed to meet the physical or social needs of older persons." 42 U.S.C. § 3607(b)(2)(C)(i). Thus, any legitimate value is derived from the existence of facilities tailored to senior's needs. Such value was not found here. The only change at Eden Roc was the termination of the adults-only policy, not the elimination of significant services or facilities. Consequently, the only lost value was the value placed on discriminatory housing practice, which is a "value" we cannot sanction.

[5] The City also argues there was no "interference" because the arbitrator's decision did not cause the managers of Eden Roc to change the park's policies or practices. Section 3617 does not require one such as Borello who is interfered with to capitulate to the interference. *See* 42 U.S.C. § 3617. This court has previously stated that § 3617 may involve a "situation where no discriminatory housing practice may have occurred at all . . . because the rights have actually been respected by persons who suffer consequent retaliation." *Smith v. Stechel*, 510 F.2d 1162, 1164 (9th Cir. 1975); *see also United States v. Gilbert*, 813 F.2d 1523, 1528 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987), *and cert. denied*, 493 U.S. 1082 (1990). This is such a case: In response to terminating a discriminatory practice, the City penalized Borello by forcing Borello to forego a portion of its income with no corresponding savings in costs. This alone was sufficient as a matter of law to constitute interference.

B.

[6] The City argues the Eden Roc Mobilehome Park was a legitimate senior housing facility when the 1988 Amendments were enacted. Therefore, the City argues, by terminating the policy, the tenants were deprived of a

legitimate housing service and were entitled to a rent reduction under the rent control ordinance. The district court, however, concluded that Eden Roc did not qualify for the senior housing exemption. We agree.

In enacting the 1988 Amendments, Congress recognized "that some older Americans have chosen to live together with fellow senior citizen[s] in retirement-type communities." House Report, *supra*, at 21. It therefore exempted "housing for older persons" from the familial-status provisions of the FHA. *See* 42 U.S.C. § 3607. Section 3607(b)(2) describes three types of housing that qualify as housing for older persons, one of which is housing

> intended and operated for occupancy by at least one person 55 years of age or older per unit. In determining whether housing qualifies as housing for older persons under this subsection, the Secretary shall develop regulations which require at lease the following factors:
>
> (1) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and
>
> (ii) that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and
>
> (iii) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 54 years of age or older.

42 U.S.C. § 3607(b)(2)(C).

"Exemptions from the Fair Housing Act are to be construed narrowly, in recognition of the important goal of

preventing housing discrimination." *Massaro v. Mainlands Section 1 & 2 Civic Ass'n*, 3 F.3d 1472, 1475 (11th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 2239 (U.S. Apr. 28, 1994) (No. 93-1703); *accord United States v. Columbus Country Club*, 915 F.2d 877, 882-83 (3d Cir. 1990) (en banc), *cert. denied*, 501 U.S. 1205 (1991). Housing must at least meet the above three requirements to qualify for the exemption.

[7] The City argues Eden Roc had "significant facilities and services." We disagree. In compliance with a congressional mandate, the Secretary of HUD has promulgated regulations providing the minimal requirements and further clarifying them. *See* 24 C.F.R. § 100.304 (1993); *see also* 42 U.S.C. § 3607(b)(2)(C). The regulations discuss the "significant facilities and services" requirement:

> "Significant facilities and services specifically designed to meet the physical or social needs of older persons" include, but are not limited to, social and recreational programs, continuing education, information and counseling, recreational, homemaker, outside maintenance and referral services, an accessible physical environment, emergency and preventive health care of[sic] programs, congregate dining facilities, transportation to facilitate access to social services, and services designed to encourage and assist residents to use the services and facilities available to them . . . .

24 C.F.R. § 100.304(b)(1). Although a facility need not have all these features, Eden Roc did not have enough to qualify. The arbitrator found

> that the services and facilities provided at Eden Roc include a swimming pool, sauna, shuffle board, laundry room and a reading room. There is a clubhouse where coffee is always available, the residents play cards and bingo and meet to socialize, the resident's club and ladies club meet, and where the potluck dinners and

> holiday celebrations are held. Additionally, Alameda County health officials come to the park monthly to check blood pressure and perform glaucoma checks and annually to provide for a more detailed physical. Health authorities also come to administer flu shots. City bus service is available at the entrance to the Park and taxi service is available to one's door. Doctors' offices and a hospital are located within a one mile radius of the Park. Educational and other recreational opportunities are provided in the Hayward community.

Adopting these facts as true, the most the tenants can claim Borello did was "to have provided those facilities which any landlord expecting to please his or her tenants would provide." *Park Place Home Brokers v. P-K Mobile Home Park*, 773 F. Supp. 46, 52 (N.D. Ohio 1991). The only factors specifically tailored to seniors' needs are the visits by health care officials. Though this is a close question, we conclude that the park's facilities did not constitute "significant facilities" under the FHA. *See Massaro v. Mainlands Section 1 & 2 Civic Ass'n*, 796 F. Supp. 1499, 1501-03 (S.D. Fla. 1992), *rev'd on other grounds*, 3 F.3d 1472 (11th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 2239 (U.S. Apr. 28, 1994) (No. 93-1703); *Lanier v. Fairfield Communities, Inc.*, 776 F. Supp. 1533, 1536-37 (M.D. Fla. 1990).

Even if Eden Roc had met this requirement, it did not satisfy the third factor. The City argues Borello expressed an intent to provide senior housing because it advised realtors that prospective tenants should be seniors. The FHA requires the landlord to publish and adhere to "policies and procedures which demonstrate an intent by the owner or manager to provide housing *for persons 55 years of age or older.*" 42 U.S.C. § 3607(b)(2)(iii); *see also* 24 C.F.R. § 100.304(c)(2). But, even before Borello created an open park on January 1, 1990, the park's written policy was to rent to persons over 18, not to persons over 55.

The City claims the park would have met these requirements if Borello had followed through with its representations to provide senior housing,[2] and therefore Borello should not be able to invalidate the rent reduction. We disagree. At the time the 1988 Amendments became effective, Eden Roc simply did not qualify for the senior housing exemption. *See Massaro,* 3 F.3d at 1479; *Seniors Civil Liberties Ass'n v. Kemp,* 965 F.2d 1030, 1032-33 (11th Cir. 1992) (condominium complex violated FHA's prohibition against discrimination based on familial status because by-laws prohibited residents under the age of 16). Borello had a choice to terminate the adults-only policy or to convert to senior housing. We refuse to adopt a rule that would deprive landowners of this choice.

C.

The City argues it should not be held liable for the arbitrator's actions because the arbitrator was an independent adjudicatory officer, not a city employee. The district court considered this argument and concluded that the City was liable because "the arbitrator acted as [the City's] agent in an administrative not judicial proceeding." [D. Ct. Op. at 10.] We agree. The arbitrator's authority was derived solely from the City's appointment in accordance with the City's ordinance. Without this delegation of power, the arbitrator would have had no authority to interpret or enforce the City's rent control ordinance.

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[2]The City-approved arbitrator suggested that the mobilehome park might fit within the "grandfather clause" for "adults-only housing developments which currently did not meet the Act's definition of housing for older adults." The grandfather clause, however, applies only to "persons residing in such housing as of September 18, 1988, who do not meet the *age requirements* . . . ." 42 U.S.C. § 3607(b)(3)(A) (emphasis added). It does not "grandfather" housing that lacks "significant facilities," or that was not intended for persons 55 or older.

The City suggests its actions are protected by arbitral immunity. Arbitral immunity ordinarily protects the individual arbitrator from liability, *see Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987) ("case law dictates that arbitrators are immune from civil liability for acts within their jurisdiction arising out of their arbitral functions in contractually agreed upon arbitration hearings"); *Austern v. Chicago Bd. Options Exch.*, B98 F.2d 882, 885-86 (2d Cir.), *cert. denied*, 498 U.S. 850 (1990), so the City cannot claim arbitral immunity shields it from liability.

The City also claims it was merely a sponsoring organization, and consequently should not be held liable for the arbitrator's decision. Courts have held that a sponsoring board will not be liable for an arbitrator's decisions, *see e.g., Corey v. NYSE*, 691 F.2d 1205, 1209 (6th Cir. 1982), but the City does not qualify as a sponsoring board. A sponsoring organization has no adjudicatory power, but nominates an impartial arbitrator. *See Ozark Air Lines v. National Mediation Bd.*, 797 F.2d 557, 563-64 (8th Cir. 1985). "It merely mediates *voluntarily* submitted disputes." *Id.* at 564 (emphasis added). Borello did not voluntarily submit to the arbitrator, but was compelled by the City to do so. Because the City of Hayward appointed the arbitrator pursuant to an ordinance mandating arbitration, the City is liable for the arbitrator's interpretation and enforcement of its rent control ordinance.

## III

The United States requested declaratory, injunctive and monetary relief, as well as punitive damages. The district court only awarded a permanent injunction that prohibited the City from interpreting its rent control ordinance in contravention of the FHA. It reasoned that "an award of compensatory and/or punitive damages is discretionary. On this record, Hayward's action were neither frivolous, malicious not oppressive. [D. Ct. Order at 12.]

[8] The United States argues the district court should have given the United States the opportunity to prove actual damages because the FHA's compensatory damages provision is not discretionary.[3] The damages provision for actions brought by the United States is found in 42 U.S.C. § 3614(d)(1) (1988), which states:

> In a civil action . . . the court —
>
> (A) may award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this subchapter as is necessary to assure the full enjoyment of the rights granted by this subchapter;
>
> (B) may award such other relief as the court deems appropriate, including monetary damages to persons aggrieved; and
>
> (C) may, to vindicate the public interest, assess a civil penalty against the respondent . . .

The United States asks us to construe the "may" language in subsection (B) as mandating compensatory damages. At first blush, this argument appears to fly headlong into the face of the plain meaning of the word "may," but an examination of Supreme Court precedent and the legislative history demonstrates somewhat surprisingly to the contrary.

[9] The Supreme Court's reasoning in *Curtis v. Loether*, 415 U.S. 189 (1974), and the legislative history of the 1988 Amendments indicate that if a party proves actual damages, a district court's award of compensatory damages is mandatory, not discretionary. In *Curtis,* the Supreme Court held that a party could demand a jury trial in a civil action under the FHA. *Id.* at 194. In deciding the case, the Court analyzed former § 361(d) of the FHA, a predecessor dam-

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[3]The United States seeks compensation for the landlord's lost rent from the date of the arbitrator's award to January 1, 1993.

ages provision, and found no discretion with respect to actual damages: "if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount." *Id.* at 197. The court based this conclusion on its characterization of the claim as a legal claim for damages, not an equitable claim for restitution. *Id.; see also United States v. Balistrieri,* 981 F.2d 916, 927 (7th Cir. 1992) (because government sought monetary damages to compensate individuals for emotional distress caused by discrimination, the "government's action was essentially a tort action for damages"), *cert. denied,* 114 S. Ct. 58 (1993); *Woods-Drake v. Lundy,* 667 F.2d 1198, 1203 (5th Cir. 1982) (directing district court "to award plaintiffs an amount sufficient to compensate them for their actual losses").

When Congress amended the FHA in 1988, it replaced former sections 3612 and 3613 with four new enforcement sections, one of which is § 3614. *See* House Report, *supra,* at 50-63. Former § 3612(c) stated: "The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, *and may award to the plaintiff actual damages* and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees . . . " 42 U.S.C.A. § 3612 (West 1977) (emphasis added). When it amended the enforcement provisions of the FHA, Congress did not substantially change the language of § 3614. If Congress disagreed with the Supreme Court's interpretation of former § 3612 in *Curtis,* it would have changed the language of the new damages provisions when it enacted the 1988 Amendments. We therefore conclude that Congress did not intend the courts to have discretion to award compensatory damages if a party has proven actual damages.

The House Report supports this conclusion. It states:

> Section [3614(d)] provides the types of relief a court may award in a civil action under this Section.

> Existing preventive relief continues, as well as other appropriate relief *including monetary damages for the persons aggrieved.* The Committee intends that relief may be awarded to all persons affected by the discriminatory housing practice. *Allowing the court to award monetary relief to persons aggrieved avoids later duplicative litigation as such persons bring actions to vindicate their rights.*

House Report, *supra,* at 40 (emphasis added) (footnote omitted). This language suggests actual damages are not discretionary because a court's refusal to award proven actual damages would not further the goal of avoiding duplicative litigation.

The City asks us to interpret the "may" language in the monetary damages provision as the Sixth Circuit has interpreted "may" in the punitive damages provision. In *Smith & Lee Assocs. v. City of Taylor,* 13 F.3d 920, 932-33 (6th Cir. 1993), the Sixth Circuit construed subsection (C), the punitive damages provision, to give "complete discretion to the court 'to vindicate the public interest,' by using the word 'may.' " *Id.* at 932. In light of our previous discussion of the legislative history of the FHA's damages provisions, we decline to apply a similar interpretation of "may" to subsection (B).

## IV

[10] Summary judgment for the United States was proper, but we remand to the district court so the United States may have the opportunity to prove Borello suffered actual damages. If the United States proves actual damages, the district court shall award compensatory damages.

Affirmed in part, reversed in part and remanded. Costs shall be assessed against the City of Hayward.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

UNITED STATES OF AMERICA,
*Plaintiff(s),*
vs.
CITY OF HAYWARD, CALIFORNIA
*Defendant(s).*

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No. C-91-4187-FMS 55

**JUDGMENT**

FILED
November 2, 1992
Clerk, U.S. District Court
Northern District of California

For the reasons stated in the Order Granting Plaintiff's Motion for Summary Judgment And Denying Defendant's Motion For Summary Judgment of this date, judgment is hereby entered in favor of Plaintiff and against Defendant.

SO ORDERED.

DATED: November 2, 1992

/s/ FERN M. SMITH
FERN M. SMITH
United States District Judge

Entered in Civil Docket Nov. 3, 1992